

UNITED STATES OF AMERICA

V.

SALIM AHMED HAMDAN

PROSECUTION RESPONSE TO  
DEFENSE MOTION FOR  
DISMISSAL FOR DENIAL OF A  
SPEEDY TRIAL IN VIOLATION  
OF ARTICLE 10 UCMJ

15 October 2004

1. Timeliness: This Motion is filed in a timely manner as required by POM 4.
2. Position on Motion: The Prosecution submits that the Defense's Motion should be denied in total.
3. Facts Agreed upon by the Prosecution: The Prosecution admits the facts alleged by the Defense in subparagraphs 4(j) and 4(n) for the purposes of this motion.
4. Facts:
  - a. The Chief Prosecutor did not ask that counsel be appointed to the Accused for the limited purpose of negotiating a pre-trial agreement, but "... to advise Mr. Hamdan on how he might engage in pretrial discussions with a view towards resolving the allegations against him." See Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan, attached.
  - b. On 23 February, the Legal Advisor to the Appointing Authority did send a reply to the Defense but, contrary to the Defense's misrepresentation, it did contain an explanation. See Memorandum date 23 February 2003, Subject: In the Case of Salem Hamdan: Questions Regarding Application of Article 10, UCMJ, attached. It explained that the Accused was being held based on his status as an unlawful combatant (a basis unrelated to military commissions).
  - c. The "back of the stack" allegation is an absolute misrepresentation. CDR [REDACTED] never said what LCDR Swift has quoted him as saying. CDR [REDACTED] merely told LCDR Swift that he did not control the order of cases and that he did not know when the Accused would be tried if a plea agreement were not reached.
  - d. On 13 July 2004, a charge of conspiracy to commit the following offenses was referred to this Military Commission: attacking civilians; attacking civilian objects;

murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

5. Legal Authority Cited:

- a. Article 10 UCMJ
- b. Article 2(a)(12) UCMJ
- c. In re Yamashita, 327 U.S. 1 (1946)
- d. Article 21 UCMJ
- e. Madsen v. Kinsella, 343 U.S. 341 (1952)
- f. Reid v. Covert, 354 U.S. 1 (1957)
- g. Article 36 UCMJ
- h. Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004)
- i. United States v. Cooper, 58 M.J. 54 (C.A.A.F. 2003)
- j. United States v. Goode, 54 M.J. 836 (N-M. Ct. Crim. App. 2001)
- k. United States v. Kossman, 38 M.J. 258 (C.M.A. 1993)
- l. Barker v. Wingo, 407 U.S. 514 (1972)
- m. United States v. Manning, 56 F.3d 1188 (9<sup>th</sup> Cir. 1995)
- n. United States v. Verdugo Urquidez, 494 U.S. 259 (1990)
- o. United States v. Reed, 41 M.J. 449 (C.A.A.F. 1995)
- p. United States v. Hatfield, 44 M.J. 22 (C.A.A.F. 1996)
- q. United States v. Reeves, 34 M.J. 1261 (N-M. Ct. Crim. App. 1992)

6. Discussion:

The Defense moves to dismiss the charge against the Accused pursuant to Article 10, UCMJ. The Defense's claim lacks merit for three reasons. First, the President has designated the Accused for trial by a military commission for violation of the laws of war or other crimes triable by military commission, so provisions of the UCMJ governing courts-martial do not apply to him. Second, as a combatant who is subject to detention

for the duration of the ongoing armed conflict, the Accused has no legal basis on which to raise a speedy trial claim related to the nature or length of his detention. Third, even if Article 10 were applicable to the Accused, he would not be entitled to any relief because he has failed to show that the military did not act with “reasonable diligence” in bringing and approving charges against him, much less that he has been prejudiced by the alleged delay.

a. Supreme Court case law establishes that Article 10 does not apply to military commissions.

The Defense argues that because the UCMJ extends personal jurisdiction in courts-martial to “persons within an area leased by or otherwise reserved or acquired for the use of the United States,” it follows that all of the substantive and procedural rules set out in the UCMJ, including Article 10, are automatically applicable to him. This argument is simply incorrect. The rules set out in the UCMJ apply to courts-martial, not military commissions. While the UCMJ recognizes the jurisdiction of military commissions to try violations of the laws of war<sup>1</sup> or other statute, it does not purport to subject such commissions to its comprehensive set of rules governing courts-martial. Indeed, the Supreme Court has repeatedly recognized that while Congress has prescribed the jurisdiction and procedures governing courts-martial, it properly has allowed the President, as Commander-in-Chief, to set the procedures for wartime military commissions, by recognizing and approving their use but not regulating their procedures.

In In re Yamashita, 327 U.S. 1 (1946), the Supreme Court expressly rejected the contention that a military commission convened to try General Yamashita was subject to the procedures in the Articles of War (the precursor to the UCMJ) governing courts-martial. The Court explained that, by Article 15 of the Articles of War (now Article 21, UCMJ<sup>2</sup>), Congress “recognized military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles,” and “gave sanction . . . to any use of the military commission contemplated by the common law of

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<sup>1</sup> Article 21 UCMJ

<sup>2</sup> Article 15 of the Articles of war reads:

The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Id. The text of UCMJ Article 21 reads:

The provisions of this chapter conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Id.

war.” *Id.* at 19. Although the Court relied in part on the fact that General Yamashita did not fall within the categories of persons made subject to the jurisdiction of the courts-martial by the Articles of War, the Court also based its holding on the fact that “the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, *was not convened by virtue of the Articles of War, but pursuant to the common law of war.*” *Id.* (emphasis added). Moreover, the Court in Madsen v. Kinsella, 343 U.S. 341 (1952), subsequently rejected any suggestion that the Articles of War would apply to the trial by commission of a person subject to court-martial, upholding the trial by military commission of a U.S. citizen subject to the jurisdiction of courts-martial, notwithstanding that the commission trial was not conducted in strict accordance with the specific Articles of War governing courts-martial.<sup>3</sup>

The Madsen Court characterized the unique nature and purpose of military commissions:

Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. *Neither their procedure nor their jurisdiction has been prescribed by statute.* It has been adapted in each instance to the need that called it forth.

*Id.* at 346-348 (footnotes omitted)(emphasis added). The Court went on to hold that, “in the absence of attempts by Congress to limit the President’s power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions . . .” *Id.* at 348. The Court explained that, in contrast to Congress’ active regulation of “the jurisdiction and procedure of the United States courts-martial,” Congress had shown “evident restraint” with respect to making rules for military commissions. *Id.* at 349. The Court further explained that Article 15 (now Article 21 UCMJ) reflected Congress’ intent to allow the Executive Branch to exercise its discretion as to what form of tribunal to employ during wartime. *Id.* at 353.

When the President established military commissions to try members of al Qaida and set out the procedures that will govern them, he exercised the very discretion that the Madsen Court held was implicit in his powers as Commander-in-Chief and was left unrestricted by Congress. Because, as Madsen explained, Congress did not purport to apply the numerous UCMJ provisions regulating courts-martial to the common law

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<sup>3</sup> In Reid v. Covert, 354 U.S. 1 (1957), a plurality of the Supreme Court ruled that a U.S. citizen civilian spouse of a serviceman could not be subjected to the jurisdiction of a court-martial during peacetime. The Reid plurality concluded that Madsen was not controlling because Madsen involved a trial in occupied enemy territory, where “the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area.” Reid at 35, note 63. Madsen remains good law today, and the Supreme Court has limited Reid to its facts. See United States v. Verdugo Urquidez, 494 U.S. 259, 270 (1990).

military commissions, Article 10 of the UCMJ, which sets out a speedy trial standard for courts-martial, is inapplicable to the military commission of the Accused.

b. The Defense misunderstands the President's use of Article 21.

The Defense contends nevertheless that because the President expressly invoked the UCMJ in establishing the military commissions, he must afford the Accused all of the procedural protection set forth in the UCMJ. The latter proposition does not follow from the former. The President invoked the provisions of the UCMJ that recognize his authority to use military commissions to try violations of the laws of war, Article 21, and to create a set of procedures to govern them, Article 36. Reliance on that authority, which the Supreme Court has construed to set military commissions apart from courts-martial and the UCMJ rules that govern them, could not logically trigger application of the entire UCMJ. Indeed, that is essentially the argument the Court rejected in Yamashita and Madsen.<sup>4</sup> In any event, that those subject to military commission do not receive the protection of Article 10 is not "contrary to or inconsistent with" the UCMJ because, as Congress recognized in taking a hands-off approach, military commissions convened during wartime to try violations of the laws of war must deal with military exigencies in administering justice. Because of the unique context in which the commissions operate, and the need for flexibility that context presents, it is not "contrary to or inconsistent with" the UCMJ for the commissions to try persons subject to its jurisdiction for violations of the laws of war without adhering to the speedy trial rules that apply to courts-martial.

c. The Accused is not in pretrial confinement.

Even if Article 10 did apply to the military commissions, the Accused cannot claim its protection, at least insofar as he seeks release from his present confinement. That is because the Accused is an enemy combatant. This status was confirmed at his Combat Status Review Tribunal on 3 October 2004. As such, he may be detained for the duration of hostilities. See Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2641 (2004) (plurality opinion). In light of his combatant status, the Accused has no legal right to seek release from a particular form of confinement based on the length of time he has been held without a trial, even assuming that the speedy trial standards applied and that the military was not complying with them. "The Department of Defense is detaining Mr. Hamdan as an unlawful enemy combatant. Article 10, UCMJ does not apply to Mr. Hamdan's detention." See Memorandum February 23, 2004, subject: In the Case of Salem Ahmed Hamdan, Question Regarding the Application of Article 10, UCMJ.

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<sup>4</sup> It should be noted that Article 38 of the Articles of War during the Yamashita and Madsen cases was the forerunner of the current Article 36, UCMJ. Like Article 36 UCMJ, Article 38 of the Articles of War prohibited commission procedures contrary to or inconsistent with the Articles of War. Yet Yamashita and Madsen still allowed substantial differences between courts-martial and military commission procedure. As such, no argument can be made that Article 36 requires the application of Article 10 UCMJ to current military commissions.

d. Assuming Article 10 applicability, there is not violation.

Moreover, assuming Article 10 did apply to the military commissions, the Accused's claim for dismissal would also fail because the Defense cannot establish any violation. In order to prevail on an Article 10 claim, the Accused must establish that the government has failed to proceed against him with "reasonable diligence." United States v. Cooper, 58 M.J. 54, 58 (2003). All that petitioner states on this score is that "the Government simply did not need over two years to gather evidence." That conclusive statement is patently insufficient. To begin with, to the extent that there is any relevant time period for an individual lawfully detained as a combatant, the Article 10 clock would not begin to run until the detainee is "ordered into arrest or confinement" pursuant to a charge. Article 10, UCMJ. To date the Accused has not been so ordered. While lacking merit, the best position the Defense can assert is that any speedy trial clock would not have begun to run until December 2003, when the Accused was placed in Camp Echo to facilitate his ability to meet with counsel in connection with the impending charges<sup>5</sup> and to ensure the intelligence gathering function was not tainted.

Additionally, the amount of time that has elapsed, standing alone, does not suggest, much less establish, the absence of reasonable diligence. As the military courts have made clear, "there is no 'magic number' of days in pretrial confinement which would give rise to a presumption of an Article 10, UCMJ, speedy trial violation." United States v. Goode, 54 M.J. 836 (N-M Ct. Crim. App. 2001); United States v. Kossman, 38 M.J. 258 (C.M.A. 1993). In the Goode case, the court held that a defendant who spent 337 days in pretrial confinement failed to make out an Article 10 or constitutional speedy trial violation. Id. at 838-840. Here, the government has charged the Accused with participating in a foreign-based, far-reaching conspiracy spanning five and a half years. The breadth and complexity of the charge as well as the fact that it was brought during the ongoing war against terror refutes petitioner's unsupported assertion that the government is engaged in any delay tactics. See Barker v. Wingo, 407 U.S. 514, 531 (1972) ("The delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.").

Indeed, a far longer period would be justified in the current instance. The United States has undertaken painstaking intelligence-gathering and interrogation with respect to hundreds of enemy combatants and suspected members of al Qaida, a highly disciplined

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<sup>5</sup> It is the Prosecution's position that there is no relevant time period for consideration regarding an Article 10 UCMJ claim. The simple fact is that the Accused is not being detained because he is awaiting trial, but because he is an unlawful combatant. As mentioned above, that means that the Accused could be held until the end of hostilities under the existing laws of war. Whether or not the Accused was facing a military commission at this time and place, he would still be detained by U.S. forces. The fact that the Accused was moved after the President found him eligible for trial by military commission does not change the underlying reason for his confinement. In United States v. Reed, 41 M.J. 449 (C.A.A.F. 1995), the Court of Appeals for the Armed Forces made clear that Article 10 is triggered either by "*pretrial* restraint or preferral of charges." Id. at 451. Because, according to Reed the Prosecution is not required to file charges as soon as probable cause exists and because the Accused is not in *pretrial* restraint there is no Article 10 violation.

organization whose agents span the globe and operate in total secrecy. See generally Al Qaida Training Manual (“Manchester Manual”), available at [www.usdoj.gov/ag/trainingmanual.htm](http://www.usdoj.gov/ag/trainingmanual.htm). It should, therefore, come as no surprise that more time has been required in this case than in courts-martial involving forcible sodomy, Goode, adultery, United States v. Hatfield, 44 M.J. 22, 23 (C.A.A.F. 1996), rape, Reed, or molestation, United States v. Reeves, 34 M.J. 1261 (N-M. Ct. Crim. App. 1992) (462-day delay).

The Defense’s claim also founders on his failure to show prejudice from the alleged delay. See Barker at 533-534. The Defense’s contention that his defense will be based on testimony “that grows more stale with each passing day” falls well short of the mark. Such “generalized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice.” United States v. Manning, 56 F.3d 1188, 1194 (9<sup>th</sup> Cir. 1995). Likewise, Defense’s assertion that the Accused’s present confinement creates any risk of psychological injury that could impair his ability to assist in his own defense is precisely the kind of speculative claim that cannot form the basis for a finding of prejudice. Id.

For the above-stated reasons, the Accused’s motion to dismiss due to violation of Article 10, UCMJ should be dismissed.

7. Attachments:

- a. Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan
- b. Memorandum date 23 February 2003, Subject: In the Case of Salem Hamdan: Questions Regarding Application of Article 10, UCMJ
- c. Combatant Status Review Tribunal Decision Report Cover Sheet

8. Oral Argument: Although the Prosecution does not specifically request oral argument, we are prepared to engage in oral argument if so required.

9. Witnesses:

- a. Major XXXX
- b. Captain XXXX
- c. Special Agent XXXX (already Protected Information pursuant to Presiding Officer Order of August 27 2004).

We ask that the names contained in (a) and (b) above also be considered Protected Information. A proposed Protective Order has been sent via separate correspondence.

XXXX  
Captain, U.S. Army  
Prosecutor





DEPARTMENT OF DEFENSE  
OFFICE OF GENERAL COUNSEL  
1600 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1600

December 15, 2003

MEMORANDUM FOR ACTING CHIEF DEFENSE COUNSEL

SUBJECT: Target Letter re Military Commission Investigation of Mr. Salem Ahmed Salem Hamdan

On July 3, 2003, the President determined that Mr. Salem Ahmed Salem Hamdan is subject to the Military Order of November 13, 2001. As a result, pursuant to Section 4(a) of the President's Military Order, Mr. Hamdan "shall, when tried, be tried by military commission for any and all offenses triable by military commission that [he] is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

The Office of the Chief Prosecutor is considering whether to prepare charges against Mr. Hamdan and present them to the Appointing Authority for approval and referral in accordance with Section 4(B)(2) of Military Commission Order No. 1, dated March 21, 2002. The charges currently under consideration include, but are not limited to: attacking civilians and civilian objects; terrorism; and conspiracy to commit the above mentioned offenses. Theories of liability in proving these offenses may include conspirator liability for the substantive offense, liability based upon being a member of an enterprise of persons who shared a common criminal purpose, aider and abettor liability, or some combination thereof.

Under my interpretation of Section 3(B)(8) of Military Commission Instruction No. 4, you are authorized to detail a military defense counsel to advise Mr. Hamdan on how he might engage in pretrial discussions with a view toward resolving the allegations against him. My office will make the arrangements with the Commander, Joint Task Force Guantanamo, for such detailed military defense counsel to have access to Mr. Hamdan. Such access shall continue so long as we are engaged in pretrial negotiations. Please advise me as soon as possible what arrangements, if any, you desire to facilitate this representation.

Attachment 1 to this memorandum is provided: 1) to assist Mr. Hamdan's detailed defense counsel in evaluating the potential charges against him; and 2) to advise Mr. Hamdan regarding his options. Additional discovery will be provided to detailed defense counsel when identified.

The final decisions regarding charges against Mr. Hamdan and the terms of any plea agreement that might be entered are within the sole discretion of the Appointing Authority. Nothing in this memorandum, or in any subsequent discussions between the



Office of the Chief Prosecutor and the defense counsel detailed to represent Mr. Hamdan pursuant to this memorandum, should be considered as binding on the Appointing Authority.

Please advise the Office of the Chief Prosecutor no later than January 9, 2004 whether or not Mr. Hamdan is interested in discussing a plea agreement.

Commander [REDACTED] is my point of contact for matters related to this memorandum.

Disclosure or other public release of the contents of this memorandum is prohibited by Military Commission Instruction No. 4, Section 3(B)(4) and Military Commission Instruction No. 5, Annex B, Section II(E)(1).

A handwritten signature in black ink, appearing to read "Frederic L. Borch", followed by a long horizontal flourish.

Frederic L. Borch  
Colonel, U.S. Army  
Chief Prosecutor (Acting)  
Office of Military Commissions

Attachment:

1. Salem Ahmed Salem Hamdan FBI 302, dated July 10, 2002